



FH
[REDACTED]

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]
[REDACTED]
[REDACTED]

DECISION
Case #: MDV - 173314

PRELIMINARY RECITALS

On March 29, 2016, the above petitioner filed a hearing request under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to challenge a decision by the Waukesha County Health and Human Services regarding Medical Assistance. The hearing was held on June 8, 2016, by telephone.

The issue for determination is whether the agency correctly denied the request for a hardship waiver of the divestment penalty period.

There appeared at that time the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Petitioner's Representative:

[REDACTED]
Senior Law, Legal Action of WI
230 West Wells, Suite 800
Milwaukee, WI 53203

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, WI 53703

By: [REDACTED]
Waukesha County Health and Human Services
514 Riverview Avenue
Waukesha, WI 53188

ADMINISTRATIVE LAW JUDGE:

John P. Tedesco
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (CARES # [REDACTED]) is a resident of Milwaukee County.

2. In May 2015, petitioner's daughter and power of attorney, [REDACTED] contacted the agency to apply for institutional MA for her mother.
3. As part of the application process, the agency sought information related to assets and potential divestment. The agency learned that petitioner's assets were reduced from over \$300,000 to less than \$2,000 in only two years.
4. The agency did not receive documentation indicating where the funds were directed. The application was denied.
5. Another application was filed on October 15, 2015. The agency requested verification by November 16, 2016. And extension was requested for the submission of verification. The verification was not received and the application was denied on November 25, 2015.
6. Another application was filed on December 11, 2015. The agency sought verification due on January 11, 2016. Some verification was received and the agency determined a divestment.
7. A divestment was determined by the agency in the amount of \$218,092.53. The penalty period would make petitioner eligible for MA after 862 days. This decision was not appealed.
8. Petitioner filed a request for a hardship waiver of the divestment period by form received in the agency January 15, 2016.
9. In order to process the hardship waiver request, the agency sought to establish that the divested funds could not be recovered by petitioner to pay for her care. On 1/15/16, the agency sent a letter to Ms. [REDACTED] requesting specific documentation (credit card bills, cancelled checks, statements showing loan payments made, etc.) relating to the funds depleted from petitioner's accounts. In this letter, agency representative [REDACTED] requests the proof needed to determine whether the funds transferred from petitioner to Ms. [REDACTED] are recoverable from Ms. [REDACTED]. The due date for the verification documents was 1/25/16.
10. On 1/21/16, an agency representative had telephone contact with [REDACTED]. The case comments indicate that the representative and Ms. [REDACTED] "discussed verification needed."
11. On 1/28/16, Ms. [REDACTED] called the agency to request an extension of the deadline to provide the requested verification.
12. The requested documentation was not submitted.
13. The agency denied the request.
14. Petitioner appealed.

DISCUSSION

This is an appeal of a denial of a request for an undue hardship waiver of a divestment penalty. The agency's denial of the request was dated 2/2/16. It was communicated to the petitioner by means of a generic Negative notice which did not include appeal rights. Typically, the appeal deadline for such a denial is 20 days after the notification is mailed. See *MEH* § 17.17. In this case, the request for hearing was filed on March 29, 2016 (the date of the postmark on the envelope containing the request for hearing. Because the notice did not state the deadline to petitioner, I am finding good cause for the late request for hearing.

When an individual, the individual's spouse, or a person acting on behalf of the individual or his spouse, transfers assets at less than fair market value, the individual is ineligible for MA coverage of nursing facility services. 42 U.S.C. 1396p(c)(1)(A); Wis. Stat. §49.453(2)(a); Wis. Adm. Code §DHS

103.065(4)(a); MA Handbook, Appendix 17.2.1. Divestment does not impact on eligibility for standard medical services such as physician care, medications, and medical equipment (all of which are known as “MA card services” in the parlance). The penalty period is the number of days determined by dividing the value of property divested by the average daily nursing home cost to a private pay patient. MA Handbook, App. 17.5.2.

First, the divestment determined by the county was in the amount of \$218,092.53. The record reflects some belief by the agency that substantial sums were transferred out of petitioner’s accounts and directed to the daughter, Ms. [REDACTED]. It appears that this was not established, however, because Ms. [REDACTED] did not cooperate with the county’s requests. It appears that petitioner did not appeal the county’s finding that nearly \$220,000 was divested improperly. But, the petitioner did seek to have the divestment penalty erased without having to show where the money went by means of an undue hardship waiver.

The Wisconsin Administrative Code, §DHS 103.065(4)(d)2.d provides that a divestment penalty can be avoided if there would be an undue hardship, and defines “undue hardship” to mean “that a serious impairment to the institutionalized individual's immediate health status exists.” The MA Handbook, App. 17.17.1 provides:

A divestment penalty period must be waived when the imposition of the penalty period deprives the individual of:

- Medical care such that the individual’s health or life would be endangered; **or**
- Food, clothing, shelter, or other necessities of life

The Handbook goes on to say at App. 17.17.5 that the following proof is needed with a hardship application: “[a] **statement signed by the individual (or his or her representative) which describes whether the assets are recoverable, and if so, the attempts that were made to recover the divested assets**” (emphasis added). This is the crux of this case. The agency denied the request because the agency requested proof of where the funds went, and all the requested verification was not provided.

The attorney for petitioner, from Legal Action of Wisconsin, does not argue that the verification provided should be sufficient. Instead, he makes the argument, which he refers to repeatedly as “simple,” that that verification is “unnecessary.” In the subsequently filed written argument he argues that “the law on undue hardship waivers for divestment does not require any proof of recoverability in order to grant a waiver.” The attorney even goes so far as to say that the county “is not permitted” to verify that the funds are not recoverable. This reasoning is absurd. First, the Medicaid Eligibility Handbook provides for verification by the county in its statement that “[v]erification is part of determining eligibility. To verify means to establish the accuracy of verbal or written statements made about a group’s circumstances. See *MEH* at § 20.1.1. Petitioner’s representatives seem to believe that finding truth and accuracy should not be a part of the process.

Second, as purely a matter of logic in order for a person to face undue hardship the funds must be non-recoverable. If the funds are recoverable, then a person will be able to pay for the medical care, food, clothing, or shelter could be paid for. The argument that a person can be shown to be subject to undue hardship without also showing that they do not have access to piles of cash misses the elephant in the room.

Finally, the argument put forth by petitioner’s representatives appears to this ALJ as contrary to the representatives’ duties to petitioner, as well as contrary to public policy. Petitioner’s counsel appears to assert that it is perfectly acceptable and legal for Ms. [REDACTED] to retain her alleged divested monetary enrichment at all costs, while petitioner falls into poverty. Indeed, at some subsequent hearing on the merits of an undue hardship denial, I presume both Ms. [REDACTED] and Attorney [REDACTED] would argue that

petitioner's "health or life would be endangered" by the divestment penalty while Ms. [REDACTED] retains assets received from petitioner. I find this entire scheme, and the legal advocacy of it, to be contrary to the spirit and letter of the divestment law. If the funds are recoverable, then wouldn't petitioner be better off because of it? If indeed the sums are not recoverable, then the undue hardship waiver may be appropriate and the representatives have a simple responsibility of providing the documents requested. That is the nature of the process of receiving public benefits from the state and its taxpayers. But, it puzzles me how the attorney in this case can maintain a straight face while arguing that that county has no right or obligation to verify that the funds petitioner gave away are not recoverable.

Under these facts, the denial of the request for undue hardship waiver is sustained.

CONCLUSIONS OF LAW

The agency correctly denied the hardship waiver request as petitioner failed to provide the required verification.

THEREFORE, it is

ORDERED

That the petition for review herein be and the same is hereby dismissed.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

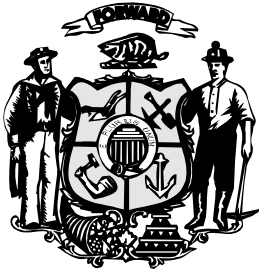
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 19th day of July, 2016

\s _____
John P. Tedesco
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

Brian [REDACTED] Administrator
Suite 201
5005 University Avenue
Madison, WI 53705-5400

Telephone: (608) 266-3096
FAX: (608) 264-9885
email: DHAmail@wisconsin.gov
Internet: <http://dha.state.wi.us>

The preceding decision was sent to the following parties on July 19, 2016.

Waukesha County Health and Human Services
Division of Health Care Access and Accountability
Attorney [REDACTED] [REDACTED]